IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-938

COX BROADCASTING CORPORATION
and
THOMAS WASSELL,

*Appellants,*

v.

MARTIN COHN,

*Appellee.*

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

## BRIEF FOR MULTIMEDIA, INC., AS AMICUS CURIAE

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This brief is filed with the written consent of the parties pursuant to Rule 42 of the Court.

## INTEREST OF AMICUS CURIAE

Multimedia, Inc., is a publicly held corporation having its principal place of business in Greenville,

South Carolina. In addition to owning daily newspapers and a radio and television station in Greenville, it owns radio and television stations in Macon, Georgia, the state in which this appeal arises. Multimedia, Inc., also owns a number of newspapers and radio and television stations in states adjacent to Georgia and South Carolina, to wit: the morning and afternoon newspapers in Montgomery, Alabama; radio and television stations in Knoxville, Tennessee, a daily newspaper and a number of weekly newspapers in middle Tennessee; both daily newspapers and a radio station in Asheville, North Carolina, and a television station in Winston-Salem, North Carolina. The newspapers of the corporation in states adjoining South Carolina and Georgia have circulation in these states, and broadcasts from certain of the electronic media owned by the company outside the states of Georgia or South Carolina are received in areas of one or the other of the two states. There is also substantial interstate circulation and broadcast penetration between the two states from the radio and television stations in Macon, Georgia, and the newspaper, radio and television stations in Greenville, South Carolina.

Three states in addition to Georgia have legislation of similar import to the statute challenged by Cox Broadcasting Corporation on this appeal. They are South Carolina, Florida and Wisconsin. The South Carolina statute was adopted in 1909 and provides as follows:

> "Whoever publishes or causes to be published the name of any woman, maid or woman child upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed

guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. But the provisions of this section shall not apply to publications made by order of court."

See Section 16-81, *Code of Laws of South Carolina*, 1962.

As a result of its several press and electronic publications within both the states of South Carolina and Georgia, Multimedia, Inc., has a direct and substantial interest in the way in which this case is decided.

## ARGUMENT

### Introduction

South Carolina adopted its statute prohibiting publications respecting the names of rape victims two years prior to the enactment of the Georgia statute. *Georgia Laws*, 1911, p. 179. The similarity of language in the statutes from the two adjoining states suggests a common genesis. The "likelihood of gallantry . . . perhaps combined with racial overtones" has been suggested as a motivation for the enactment of these statutes in an article noting that Florida also passed a similar statute in 1911. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 Stanford L.Rev. p. 107, 128. Without embracing these influences as the stimulus leading to the enactments, we can certainly say, from the closeness in time and geographical area of their passage, they appealed to the regional mores of the day. We must also say that whatever it was that commanded action in these three southern states did not have

similar sway in the rest of the nation. Only Wisconsin in 1925 passed any similar legislation.

There is no real legislative history for any of these enactments of which we are aware. It is said in *Nappier and Gunter v. Jefferson Standard Life Insurance Company and Jefferson Standard Broadcasting Company*, 322 F.2d 502 (4th Circuit, 1963) (the only decision construing the South Carolina statute) that the object of the law is to "encourage a free report of the crime by the victim". This, in fact, is merely the court's rationale for construing the South Carolina statute to prohibit not just the name but the identity of the rape victim. Nothing is really known of the legislative intent stirring these three deep south states to their near simultaneous action, nor do we know why the similar act occurred in Wisconsin nearly a generation later. If these statutes are to stand, however, they must be given a force sufficiently compelling to breach the ramparts set around free speech by the First Amendment. While it is no doubt true that the statutes might find vindication even in the absence of a legislative history, we submit that through the processes of reasoning (the only means in this case by which any "showing" can be made) it is impossible to give this narrow body of legislation the life force required for its survival in the face of the First Amendment.

## I.

## IN BROADLY PROHIBITING PUBLICATION OF THE NAME OR IDENTITY OF RAPE VICTIMS, STATUTES SUCH AS THOSE IN EFFECT IN GEORGIA AND SOUTH CAROLINA VIOLATE THE FIRST AMENDMENT AND RESULT IN CENSORED AND DISTORTED NEWS COVERAGE.

The statutes of Georgia and South Carolina can easily be discussed together. Both statutes are broadly drawn

so as, on their face at least, totally to prohibit publication at any time of the name of a woman subjected to rape. While the South Carolina statute has not been construed as to its total scope, it would presumably be accorded the same breadth as that given by the Supreme Court of Georgia to the statute of that state.

We do not in this brief repeat the persuasive arguments of the appellant in asserting unconstitutionality of the Georgia statute under the overbreadth doctrine. We believe it is worth pointing out in this brief, however, additional results of the broad proscription written into these laws.

Rape does not always occur as the single crime involved. The victim may be kidnapped and then subjected to rape. More frequently, as in the case in this appeal, sexual assault may be combined with the killing of the victim. All three crimes may often times be involved. Almost invariably, knowledge of the sexual assault comes after knowledge of the other crimes involved.

In the case of a kidnap, for example, the news media will typically join in the all-out effort to circulate as widely as possible the identity of the victim and their efforts in doing this are lauded with no exception. When the kidnapper is apprehended, this newsworthy fact is also given publicity and no one would question the imperative need to broadcast as a warning to others the apprehension of the criminal as well as his prosecution. But in the usual case it will be established only belatedly that the victim has been subjected to sexual assault and the prosecution which then ensues will involve not only the kidnapping but a charge of rape. Under the Georgia statute as construed by the Supreme Court of that State and under the equally

broad language of the South Carolina act, the news media are unable to give accurate coverage to the prosecution and trial. They must entirely hide from their readers the fact that any trial for rape is involved. This is so because the identity of the victim is already known as a result of the publicity given in connection with the kidnapping. Thus, if anything is to be written at all, it must be the half-truth that a trial is underway involving only the crime of kidnapping. Reports of the conviction and sentencing must likewise be distorted. The First Amendment was not meant to be subjected to this measure of violence in the name of misguided notions of gallantry.

In the *Nappier* case where the Court of the Fourth Circuit declared an action to exist for breach of privacy under the common law of South Carolina "as fortified by the statute", there was involved a television broadcast in which the names of the victims were not mentioned in the pictures or the narrative. The court, reading the statute to prohibit revealing the victim's identity, found that the two girls assaulted were well known as employees of the Dental Health Department working in the public schools with a puppet show in which the puppet was commonly known as Little Jack. They were identified, the court held, because the telecast showed pictures of their automobile revealing its license number and the words "Little Jack, Dental Division, South Carolina State Department of Health". The announcer described the vehicle as that used by the two young women who had been sexually assaulted.

The decision in *Nappier* viewed merely as a matter of construction seems right; but when studied in the background of the myriad occurrences reported in the news, it simply shows how wide an opening has been made in the Pandora's box.

If the identity of the victim becomes known in any manner, does the publication by which identity can be established *dehors* the publication itself subject the publisher to liability? This is not at all a far-fetched problem but one of repeated practical concern. In some situations, good taste would weigh against announcing the name of a person assaulted. But, particularly where the matter has become the subject of a public prosecution, the limits on news sought to be imposed by these statutes simply would not occur to reasonable men. Hence, transgressions of the statutes inevitably occur by unwary publishers—for example, by publications originating out of state where the author has no reason to know of the local statute, or, for that matter, by radio and television broadcasts within the state where the immediacy of the publication results in a limited opportunity for reflection or editorial review. In these situations, the identity of the rape victim may be widely circulated along with the name of her attacker. When this has occurred, the prudent publisher who is aware of the law may elect a course of total censorship in reporting the progress of a trial. He will do this because the situation will now permit nothing to be said without further identifying the rape victim.

It is not simply to satisfy a public taste for gossip or sensational reading that the First Amendment should permit accurate, uncensored publication in the field of sexual molestation. A community needs to know as much as can be known of the habits and mode of operation of sexually disturbed people. This is part of the general wisdom by which we seek to train our children into safe habits when approached by strangers. For most of the populace, this wisdom will come more from the daily contacts with life reported in a free press than it will from a study of textbooks in clinical

psychology. The court in *Briscoe v. Readers' Digest Association*, 93 Cal. Rptr. 866, 483 P.2d 34 (1971) gave cogent recognition to this in saying: "—these are vital bits of information for people coping with the exigencies of modern life".

Unquestionably a sexual assault is an emotionally devastating experience and one apt to be attended with great feelings of shame and humiliation. In some cultures it is apparently still a fact that a woman who has been raped is considered defiled.[1] It is a sensible society, however, that, while not discounting the indignity done, refuses to treat the victim of a sexual assault as a sullied outcast. Women have travelled a long road in pursuit of their quest for equal treatment and often times the most galling discriminations to which they are subjected appear in form as a chivalric act for their protection. The South Carolina statute is not directed toward both males and females who are subject to sexual assaults. It singles out the woman or "woman child" and makes no mention of the man or the "man child". A statute which perpetuates the implicit notion that a woman who has been subjected to sexual abuses stands in a different category from men rests on notions demeaning to women and inappropriate to their increasingly recognized claims for equal status.

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[1] Accounts of the brief war in 1971 between India and Pakistan report that the married women of Bangladesh raped by the invading soldiers were rejected as outcasts even by their husbands. "The Rapes of Bangladesh", *The New York Times Magazine*, p. 10, July 23, 1972.

## II

## THE PROHIBITIONS AGAINST PUBLICATION CONTAINED IN STATUTES SUCH AS THE ONE INVOLVED ON THIS APPEAL NOT ONLY LIMIT FREE SPEECH BUT ALSO IMPAIR OTHER CONSTITUTIONAL RIGHTS.

It is unnecessary to repeat the point correctly made in the appellant's brief that a state's power to regulate speech is narrow and exists at all only upon a showing of grave and immediate danger to interests which the state may lawfully protect. The invasion must rest on a compelling basis, and there must be a rational classification of the interests sought to be protected. Thus, if the thrust of the attempted regulation is also to impair other constitutional rights, the absence of justification for limiting free speech becomes immediately apparent.

We have already suggested that at its root the statutory prohibition against publication of the identity of sexually molested women perpetuates a double standard inconsistent with the dignity and equal status toward which women would rightly move. If, however, we view these statutes as furnishing a proper protection against publicity, then it is a protection which should be conferred equally upon both sexes. It appears clear that in this light, the statutes are violative of the equal protection clause of the 14th Amendment. *Reed v. Reed*, 404 U.S. 71 (1971).

It was suggested in *Nappier* that the basis for shielding a victim's identity from publication is that the victim is more apt on this account to come forward with a report of the rape. If this is offered as the supporting rationale, of course the reason is gone if, as in the case on appeal, the victim is dead at the time of

publication. A statute so broadly framed as not to take account of this must in any event fall. But even if the victim is still alive, how can we say that the humiliation involved in sexual molestation will be any stronger deterrent to prosecution depending on whether the sex of the person involved is male or female. There is, we submit, no constitutional justification for protecting the sensibilities of one more than the other, or for assuming that one will be uninhibited in the prosecution of a crime while the other will not.

Equally important to a consideration of the argument that one is more apt to come forward if she can do so without having her identity disclosed is the effect upon the rights of the accused. Under the Sixth Amendment the accused has the right to a public trial and to be confronted with the witnesses against him. These rights are basic protections. Speaking of the right of confrontation, and the included right of cross-examination, the Supreme Court in *Green v. McElroy*, 360 U.S. 474 (1959), said:

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect the rights from erosion."

The right to be confronted with his accuser and the right to a public trial is not, we believe, fully secure when the accuser comes into court to level charges incognito. The plight of the defendant is considered in the article by Professor Franklin in 16 Wisconsin Law Review at page 137. He notes that, for example, the defense of the accused may be consent where identification of the complainant might be helpful in

securing testimony of others in the community as to her poor reputation for morality and veracity. He observes that the defense may also be helped by witnesses who saw the complainant shortly after the alleged attack and might testify to her apparent calm and unruffled manner and he concludes:

> "Although gathering witnesses is a job for the defense, every impediment to the accused in the preparation of his defense is contrary to our notions of a fair trial."

The notions of a fair trial implicit in the history-laden concepts of the right to a public trial and the right of confrontation are measurably impaired by the special anonymity given to women compiaining to have been sexually molested. If, as we believe, the defendant in this circumstance is deprived of due process then surely the statute by which this is accomplished cannot claim the right of survival against the interests of free speech.

## III

**PUBLICATIONS SOUGHT TO BE PROHIBITED BY STATUTES SUCH AS THE ONE INVOLVED ON THIS APPEAL SHOULD BE DECLARED PRIVILEGED AS MATTERS OF PUBLIC INTEREST ENTITLED TO UNIFORM PROTECTION THROUGHOUT THE NATION.**

In *Nappier*, the argument was made that the telecast concerning the sexual assault was a matter of public concern and accordingly was exempt from the rule of privacy. The Fourth Circuit responded as the Georgia Supreme Court has done in this case:

> "The ready replication is that the statute states an exception to the exemption. No matter the news value, South Carolina has unequivocally declared

the identity of the injured person shall not be made known in press or broadcast."

It was not claimed in *Nappier* that the publication was protected under the constitutional guarantee of freedom of speech and of the press. Perhaps this was because the constitutional protections given to publications of matters of public interest had not yet fully unfolded in the decisions of this court. In any event, the Fourth Circuit noted that no constitutional infringement had been suggested.

It was shortly after the decision of *Nappier* in 1963 that this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), began the enunciation of principles by which the guarantees of free speech were made applicable to state laws of libel and invasion of privacy. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that the New York Times rule is applicable to "reports of matters of public interest". The decision involved an alleged invasion of privacy resulting from an article in *Life* Magazine claimed to have falsely reported that a new Broadway play portrayed an experience suffered by the plaintiff and his family. This decision dissipated any remaining notion that the rule in *New York Times* was confined to "the preserve of political expression or comment on public affairs". *Time, Inc. v. Hill* was followed by *Rosenbloom v. Metromedia, Inc.* 403 U.S. 20 (1971). There the publication involved a private individual (an alleged dealer in pornographic literature) in a holding that the publication involved a matter of "public or general concern" as a consequence of which plaintiff's recovery was barred. The plurality opinion points out the basis from which the *New York Times* rule is derived:

"Not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individu-

al,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest ... in that circumstance, we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern albeit leaving the delineation of the reach of that term to future cases." 403 U.S. 29, 44.

In *Time, Inc. v. Johnson,* 448 F.2d 378 (1971), the Fourth Circuit Court of Appeals succinctly expresses the significance of the holding in *Rosenbloom:*

> "*Rosenbloom,* it is true, did not attempt to delineate the exact limits of the phrase 'matter of public or general interest', as used in the plurality opinion, choosing to leave that task, as it put it, 'to future cases'. It did declare that the term was not to be limited to matters bearing broadly on issues of responsible government.' It cited *Time, Inc. v. Hill* ... by way of illustration, to the effect that the 'opening of a new play linked to an actual incident, is a matter of public interest.' In so doing, the plurality opinion was substantially restating what the Court had emphasized in *Hill* that the sweep of the *New York Times* privilege is not confined to "political expression or comment upon public affairs,' nor even matters of social utility or educational value. *It embraces the entire range of legitimate public interest.* 448 F.2d 378, 382-83 (footnote omitted, emphasis added)."

While it is possible to imagine circumstances where the publication of the name of a rape victim is not a matter of public interest or concern, this is most assuredly not the case in the circumstances involved on this appeal. Indeed, the appellant seems favored with a

clearer case than it would really need to establish that its freedoms under the First Amendment are infringed. The appellant's reporter gave a truthful account concerning what took place in open court in a matter of widespread interest to the community. Nowhere under these circumstances would any court give a right of recovery at common law for invasion of privacy, and it is clear that the right was given in Georgia only because the legislature in that state has claimed for itself the right to determine what constitutes a matter for public interest or concern.

As a publisher broadcasting radio and television transmissions into the State of Georgia from outside that state and as the publisher of newspapers in adjoining states which are circulated within the state, Multimedia, Inc., stands in the special jeopardy of the outsider who publishes at his peril if the State of Georgia is permitted to set the scope of free speech by determining which subjects are matters of public interest. If this Court should sanction the state-by-state determination of what may permissibly be published in the public interest, there will be no stopping point. The resulting legislation would step by step destroy any uniformity in the range of protection meant to be afforded under the First Amendment. Interstate publication could not be made in safety, for what might be perfectly proper in one state could be condemned in another. The special dangers of publications originating outside the state were recognized by Mr. Justice Black in a concurring opinion in *New York Times* noting the "easy prey" to which out-of-state newspapers could be made subject, 376 U.S. 254, 295.

*Hill* and *Rosenbloom* have left open to future cases the delineation of the limits of the phrase "matter of public or general interest". The touchstone is the

Constitution, and the process is to find and spell out its command on each concrete challenge. In doing this, it is the judgment of the Court, not the legislature, which must control.

We submit the time is at hand for this Court to hold that statutes such as the one involved on this appeal invade the Constitutionally guaranteed freedom to publish matters of public or general interest.

Respectfully submitted,

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